Supreme Court, U. S.
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MICHAEL RODAK, JR., CLERK

77-16
No.

In the Supreme Court of the United States

OCTOBER TERM, 1977

UNITED STATES OF AMERICA, APPELLANT

v.

STATE OF GEORGIA, DEPARTMENT OF TRANSPORTATION

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF GEORGIA

JURISDICTIONAL STATEMENT

WADE H. MCCREE, JR.,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1977

No.

UNITED STATES OF AMERICA, APPELLANT

v.

STATE OF GEORGIA, DEPARTMENT OF TRANSPORTATION

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF GEORGIA

JURISDICTIONAL STATEMENT

OPINION BELOW

The order of the district court (App. A, *infra*, pp. 1a-7a) is not officially reported.

JURISDICTION

The judgment of the district court was entered on April 14, 1977 (App. G, *infra*, pp. 14a-16a).[1] A

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[1] The district court originally entered its judgment on December 30, 1976 (Apps. B and C, *infra*, pp. 8a-10a). On

February 25, 1977 (App. D, *infra*, p. 11a), the government filed a notice of appeal to the United States Court of Appeals for the Fifth Circuit in the belief that the case was similar to *United States* v. *Christian Echoes*, 404 U.S. 561. There, the Court ruled that it had no jurisdiction under 28 U.S.C. 1252 to consider the government's direct appeal because the district court did not hold the tax statute at issue to be unconstitutional as a whole or as applied, but only that the appellee was entitled to tax-exempt status. The Court accordingly vacated the judgment of the district court and remanded the case to it for the entry of a fresh decree so that the government could seek review in the court of appeals (404 U.S. at 566).

Upon reflection, we concluded that the district court's decision that the federal civil aircraft use tax is unconstitutional as applied to the states could be appealed only to this Court under 28 U.S.C. 1252. See also 28 U.S.C. 1291. We therefore requested the court of appeals to vacate the judgment of the district court and remand the case to it for the entry of a new judgment from which an appeal to this Court could be taken. Pursuant to our motion, the court of appeals has so ordered (App. E, *infra*, p. 12a) and the district court thereupon entered a new judgment (App. F, *infra*, p. 13a), from which we have filed a notice of appeal to this Court (App. H, *infra*, p. 17a).

The action of the court of appeals is analogous to the familiar practice of this Court, when it concludes that it lacks jurisdiction to hear the merits of a case, to assume sufficient appellate jurisdiction to vacate the judgment of a district court so that the district court can enter a new decree from which an appeal could be taken to the court of appeals. See, *e.g.*, *United States* v. *Christian Echoes*, *supra*, 404 U.S. at 566; *Mitchell* v. *Donovan*, 398 U.S. 427, 431; *Wilson* v. *City of Port Lavaca*, 391 U.S. 352; *Walling* v. *Reuter Co.*, 321 U.S. 671, 676-677; *Phillips* v. *United States*, 312 U.S. 246, 254; *Garment Workers* v. *Donnelly Co.*, 304 U.S. 243, 251-252; *Oklahoma Gas Co.* v. *Packing Co.*, 292 U.S. 386, 392; *Gully* v. *Interstate Nat. Gas Co.*, 292 U.S. 16, 18-19. Similarly, where an appeal from a three-judge district court was erroneously taken to the court of appeals and then to this Court and the time within which a direct appeal from the district court to this Court has expired, the Court has vacated the judgment of the court of appeals and remanded the case to the district court for the entry of a fresh decree from which an appeal to this Court might be taken. *Query* v. *United States*, 316 U.S. 486, 490-491. The court of appeals likewise had jurisdiction to vacate the judgment of the district court and remand the case for the entry of a new judgment. As this Court stated in *Electrical Corp.* v. *Thomas Co.*, 307 U.S. 241, 242, "the Circuit Court of Appeals had jurisdiction, as we have held this court has, to entertain the appeal, not for the purpose of passing on the merits, but to direct the reformation of the decree" (footnotes omitted).

notice of appeal to this Court was filed on May 9, 1977 (App. H, *infra*, p. 17a). The jurisdiction of this Court rests on 28 U.S.C. 1252, which authorizes a direct appeal to this Court from a final judgment of a court of the United States holding an Act of Congress unconstitutional in a civil action to which the United States is a party. A direct appeal lies where, as here, a statute is ruled unconstitutional as applied to particular circumstances. *Fleming* v. *Rhodes*, 331 U.S. 100.

QUESTION PRESENTED

Whether the federal excise tax imposed upon the use of civil aircraft by 26 U.S.C. 4491 can be constitutionally applied to aircraft owned by the states and used for official purposes.

STATUTE AND REGULATIONS INVOLVED

The pertinent provisions of 26 U.S.C. 4491 and 4492 and of Treasury Regulations on Manufacturers' and Retailers' Excise Tax, Section 154.3-1(a) (26 C.F.R.) are set forth in Appendix I, *infra*, pp. 18a-22a.

STATEMENT

The State of Georgia owns approximately 45 aircraft, each of which is registered with the Federal Aviation Administration, pursuant to Section 501(a) of the Federal Aviation Act of 1958, 72 Stat. 771 (49 U.S.C. 1401(a)). These aircraft are used by the various departments and agencies of the State solely for the conduct of official business (Stip. pars. 11, 15, 18).[2]

Pursuant to 26 U.S.C. 4491, an annual excise tax is imposed upon the use of taxable civil aircraft in the navigable airspace of the United States.[3] The term "taxable civil aircraft" includes any engine-driven aircraft "registered, or required to be registered, under Section 501(a) of the Federal Aviation Act of 1958" (26 U.S.C. 4492). Under Section 154.3-1(b)(2) of the Treasury Regulations on Manufacturers' and Retailers' Excise Tax (1954 Code) (26 C.F.R.), "taxable civil aircraft" includes "civil aircraft owned by the United States and State and local governments"[4] (App. I, *infra*, p. 22a).

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[2] "Stip." refers to the stipulation of facts filed in the district court.

[3] The annual rate of tax is $25, plus 2 cents per pound of takeoff weight over 2,500 pounds in the case of a non-turbine-powered aircraft, and 3½ cents per pound of takeoff weight in the case of a turbine-powered aircraft. Section 4491(a) of the 1954 Code.

[4] Military aircraft are exempt from the tax. See Treasury Regulations, Section 154.3-1(b)(2); H.R. Rep. No. 91-601, 91st Cong., 1st Sess. 48-49 (1969).

The State of Georgia paid $4,302.22 in federal aircraft use taxes for its taxable year ended June 30, 1971, and sought a refund of those taxes, which was denied (Stip. pars. 5-7). In this refund suit brought by the State of Georgia in the United States District Court for the Northern District of Georgia, the State contended that the application of the federal civil aircraft use tax to aircraft owned and operated by it for official business was unconstitutional under the doctrine of intergovernmental tax immunity (App. A, *infra*, p. 1a). Upon cross-motions for summary judgment, the district court held that Section 4491 was "unconstitutional as applied to aircraft owned by the State of Georgia and operated for the purpose of accomplishing essentially governmental functions," on the authority of *National League of Cities* v. *Usery*, 426 U.S. 833 (App. A, *infra*, p. 6a). In the district court's view, the tax was invalid because there was neither a vital federal interest nor exigent circumstances that would justify its imposition upon aircraft owned by the State of Georgia (*ibid.*).

THE QUESTION IS SUBSTANTIAL

The question presented in this case—the constitutionality of the federal civil aircraft use tax as applied to aircraft owned by the states—is presently before the Court in *Commonwealth of Massachusetts* v. *United States*, 548 F.2d 33 (C.A. 1), certiorari granted, June 20, 1977 (No. 76-1500). The court of appeals in that case upheld the tax as applied to aircraft owned by the state as a valid user charge, stat-

ing that "[n]o logical reason exists why all users of the air transportation system should not pay their fair share of such costs" (548 F.2d at 36) (quoting from *State of Texas* v. *United States*, 30 A.F.T.R. 2d 5935, 5938 (W.D. Tex.), affirmed *per curiam*, 31 A.F.T.R. 2d 1473 (C.A. 5)). In so holding, the First Circuit correctly observed that the federal aircraft use tax is " 'a charge for services rendered * * * and represents a quid pro quo, and * * * as such, is outside the scope of the doctrine of implied intergovernmental immunity' " (548 F.2d at 35) (quoting from *State of Texas* v. *United States*, *supra*, 30 A.F.T.R. 2d at 5938).

Since the identical question is before the Court in *Commonwealth of Massachusetts*, *supra*, the Court should hold this appeal pending its disposition of that case.[5]

Respectfully submitted.

WADE H. MCCREE, JR.,
Solicitor General.

JULY 1977.

[5] We are serving a copy of this jurisdictional statement upon counsel for the petitioner in the *Massachusetts* case.

APPENDIX A

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

Civil Action No. 75-1155A

[Filed December 30, 1976]

STATE OF GEORGIA, DEPARTMENT OF TRANSPORTATION

vs.

UNITED STATES OF AMERICA

ORDER

This is an action brought by the State of Georgia to procure the refund of a tax collected pursuant to § 4491 of the Internal Revenue Code of 1954, 26 U.S.C. § 4491. The action is presently before this court on cross-motions for summary judgment.

Section 4491(a) of the Internal Revenue Code provides for the imposition of a tax on the use of any taxable civil aircraft during the applicable year. The Department of Transportation of the State of Georgia owns several aircraft upon which this tax has been imposed. Plaintiff alleges that collection of this tax renders § 4491 unconstitutional as applied, because it demands payment by an organ of state government to the federal government in violation of the constitutional doctrine of inter-governmental immuity. Plaintiff further contends that the tax is

levied directly against state activities which yield no profit and which comprise distinctly governmental, rather than propriety, functions. In response, defendant contends that the payment demanded by § 4491 is a service charge levied pursuant to the commerce power of the United States.

In an order of this court dated August 16, 1976, the parties were instructed to brief the question of whether the imposition of the instant tax "unduly interferes" with the performance of the State's governmental functions, *see City of New York* v. *United States*, 394 F. Supp. 641 (1975)[1] by directly displacing "the state's freedom to structure integral operations in areas of traditional governmental functions." *National League of Cities* v. *Usery*, —— U.S. ——, 96 S. Ct. 2474 (1976). The parties seem to concede *sub silencio* that the *National League of Cities* decision is dispositive of the instant action. However, the parties vary markedly as to the proper reading of that decision.

In *National League of Cities, supra*, the Supreme Court held unconstitutional Congress' attempt through amendment of the Fair Labor Standards Act, 29

[1] *City of New York* v. *United States, supra*, and the other cases cited in defendant's brief were decided prior to the Supreme Court's decision in *National League of Cities*. The latter decision revived to a degree presently not ascertainable a doctrine which most authorities thought dead. Therefore, while the reasoning presented in *City of New York* is appealing, the authorities on which that reasoning is based are no longer applicable. Accordingly, the *City of New York* decision must also be viewed as superceded.

U.S.C. § 201, *et seq.* to dictate minimum wage requirements for state and municipal employees. The state contends that in that decision the Supreme Court defined undue interference in terms of the directness rather than the magnitude of the impact which the federal legislation had upon state goals and instrumentalities. On the other hand, defendant contends that *National League of Cities* requires this court to measure the substantiality of the dollar impact upon the program in question and to determine whether, on balance, the interference generated by the federal tax is indeed "undue."

The opinion does not lend a great deal of light to the distinction which the instant parties propound. *National League of Cities* was decided by a five to four majority with four justices joining in the Court's opinion and one justice concurring and filing a separate opinion. Mr. Justice Rehnquist, writing for the Court, states at several junctures that "factual disputes as to the effect of the amendments [are] not critical to our disposition of the case." *National League of Cities* v. *Usery, supra*, 96 S. Ct. at 2471 (1976). Nevertheless, a great deal of Justice Rehnquist's analysis is based upon the substantially increased costs which would be visited upon the states as the result of the federally imposed minimum wage guidelines in that decision. Therefore, it is difficult to determine whether the court was really addressing a situation such as the instant one in which the impact of a federal statute enacted ostensibly pursuant to the commerce and taxing power falls directly upon

the state, albeit with rather a modest pecuniary force and effect.[2]

The pivotal opinion explaining the Court's reasoning is Mr. Justice Blackmun's concurring opinion. Justice Blackmun characterized the Court's opinion as setting forth a balancing approach which would "not outlaw federal power in areas such as environmental protection, where the federal interest is demonstrably greater and where state facility compliance with imposed federal standards would be essential." *National League of Cities* v. *Usery*, *supra*, 96 S. Ct. at 2476 (1976).[3]

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[2] Upon careful reflection we believe that Justice Rehnquist is correct in noting that the facts are not vital to the *National League of Cities* holding. In that case the Court was addressing the question of whether or not the federal government has the *power* to take the action which it purports to take. The question of whether or not this power exists is not a question of degree which can be placed on a monetary scale and weighed. The power either exists or it does not exist. *Cf. Wilson* v. *New*, 243 U.S. 332 (1917). In the instant case, such power does not exist.

[3] Apparently, the balancing which Justice Blackmun contemplates is a balancing of federal and state interests in subject matter terms rather than in monetary terms. In the example which Justice Blackmun posits, the federal interest in uniformity in environmental regulation would exceed the state interest in promulgating its own standards, regardless of the monetary impact which the federal statute or regulation could have upon the states. Therefore, Justices Blackmun and Rehnquist would most likely concur in the view that the outcome of the instant action should not depend upon a *quantitative* determination with respect to the permissible limits of federal taxation of state instrumentalities. On the contrary, the power to tax in a particular subject matter area either exists or it does not exist, and is, therefore not a question of degree.

We, however, are inclined to conclude that the tax on the operation of a state-owned airplane for exclusively governmental purposes is not the kind of preeminent federal interest envisioned by Justice Blackmun. Congress has the power to determine that the users of an airport engaged in interstate commerce should be responsible to pay for its maintenance. However, when the user is a State engaged exclusively in an activity which is one traditionally entrusted to the state's care, we believe that Congress does not have the power at the outset to enforce its determination against the State, *see Indian Motorcycle* v. *United States*, 283 U.S. 570 (1930), unless there is a federal interest at stake in peculiar need of protection. In the instant case, we can perceive no federal interest of such magnitude warranting the imposition of a federal tax on the State under the circumstances herein.

This is not a situation such as Mr. Justice Blackmun posits, where the failure to comply by one governmental entity may destroy the efficacy of an entire federal program. Although the federal government does have a peculiar interest in controlling the number and spacing of incoming and outgoing flights, there exists no parallel overriding federal policy in terms of being able to tax each and every such flight. Furthermore, the relatively small $4,000.00 tax payment here in controversy, although not substantial enough to stop the State's programs in their tracks, might be significant enough to affect the State's basic policy choices as to whether or not air travel is the

most efficacious means through which to accomplish its governmental obligations. For instance, the state might now elect to use fewer air patrols and more ground level reconnaisance in detecting and combatting forest fires. This would constitute the sort of federal interference which "directly supplants considered policy choices of the State's elected officials and administrators . . ." *National League of Cities* v. *Usery*, *supra* at 2472 (1976). In sum, the imposition of the federal tax *sub judice* can be viewed as direct federal interference with the State's performance of its governmental functions.

However, our decision today need not turn solely upon the degree to which the federal tax interferes with the state's setting of priorities. Implicit in both Mr. Justice Rehnquist's majority opinion and Mr. Justice Blackmun's concurring opinion, is the notion that, in the absence of special circumstances such as an emergency or the need to protect a peculiar and pre-eminent federal interest, the federal government has *no power* to tax the entities through which a state carries forward its essential and traditional governmental functions. In the instant case, we find neither a vital federal interest nor the existence of exigent circumstances justifying the imposition of the federal aircraft tax. Therefore, we find that the tax *sub judice* is unconstitutional as applied to aircraft owned by the State of Georgia and operated for the purpose of accomplishing essentially governmental functions.

Accordingly, for the reasons hereinabove expressed,

plaintiff's motion for summary judgment is hereby GRANTED and defendant's motion for summary judgment is hereby DENIED.

IT IS SO ORDERED.

This, the 30th day of December, 1976.

/s/ Richard C. Freeman
RICHARD C. FREEMAN
United States District Judge

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

Civil Action File No. C 75-1155 A

[Filed December 30, 1976]

STATE OF GEORGIA, DEPARTMENT OF TRANSPORTATION

vs.

UNITED STATES OF AMERICA

JUDGMENT

This action came on for consideration before the Court, Honorable RICHARD C. FREEMAN, United States District Judge, presiding, and the issues having been duly considered and a decision having been duly rendered, GRANTING PLAINTIFF STATE OF GEORGIA, DEPARTMENT OF TRANSPORTATION'S MOTION FOR SUMMARY JUDGMENT

It is Ordered and Adjudged that plaintiff STATE OF GEORGIA, DEPARTMENT OF TRANSPORTATION recover of the defendant UNITED STATES OF AMERICA its costs of action.

Dated at ATLANTA, GEORGIA, this 30th day of DECEMBER, 1976.

Filed & Entered in
Clerk's Office
December 30, 1976
Ben H. Carter, Clerk

By: /s/ Kay Bates
Kay Bates
Deputy Clerk

BEN H. CARTER
Clerk of Court

By: /s/ Kay Bates
Kay Bates
Deputy Clerk

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

Civil No. 75-1155A

[Filed January 25, 1977]

STATE OF GEORGIA,
DEPARTMENT OF TRANSPORTATION, PLAINTIFF

v.

UNITED STATES OF AMERICA, DEFENDANT

JUDGMENT

This action came on for consideration before the Court, Honorable Richard C. Freeman, United States District Judge, presiding, and the issues have been duly considered and a decision having been duly rendered granting plaintiff, State of Georgia, Department of Transportation's Motion for Summary Judgment and denying defendant, United States' Motion for Summary Judgment.

IT IS ORDERED and ADJUDGED that this Court's Judgment entered December 30, 1976, is hereby vacated and set aside, that the plaintiff State of Georgia, Department of Transportation recover *nunc pro tunc* to December 30, 1976, of the defendant,

United States of America, $4,110.52 in tax and $191.70 assessed interest for a total amount of $4,302.22, plus interest according to law from July 26, 1971, and that the plaintiff also recover of the defendant, its costs of this action.

Dated this 25 day of Jan., 1977 and entered *nunc pro tunc* the 30th day of December, 1976.

/s/ Richard G. Freeman
United States District Judge

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE
NORTHERN DISTRICT OF GEORGIA
ATLANTA GEORGIA

Civil No. 75-1155A

[Filed February 25, 1977]

STATE OF GEORGIA,
DEPARTMENT OF TRANSPORTATION, PLAINTIFF

v.

UNITED STATES OF AMERICA, DEFENDANT

NOTICE OF APPEAL

Notice is hereby given that the defendant, United States of America, hereby appeals to the United States Court of Appeals for the Fifth Circuit from the Judgment of the Court dated January 25, 1977, and entered *nunc pro tunc* December 30, 1976.

JOHN W. STOKES, JR.
United States Attorney
SHERMAN JOHNSON
Assistant United States Attorney

By: /s/ Gregory R. Schwandt
GREGORY R. SCHWANDT
Attorney, Tax Division
Department of Justice
Washington, D.C. 20530
Telephone No.: (202)-739-3534

APPENDIX E

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 77-1454

[Filed March 30, 1977]

STATE OF GEORGIA, DEPARTMENT OF TRANSPORTATION, PLAINTIFF-APPELLEE

versus

UNITED STATES OF AMERICA, DEFENDANT-APPELLANT

Appeal from the United States District Court
for the Northern District of Georgia

Before AINSWORTH, MORGAN and GEE, Circuit Judges.

BY THE COURT:

IT IS ORDERED that appellant's motion to vacate the judgment of the District Court for the Northern District of Georgia, dated January 25, 1977, and entered *nunc pro tunc* December 30, 1976, and to remand the referenced cause to the said District Court is GRANTED.

APPENDIX F

IN THE UNITED STATES DISTRICT COURT
FOR THE
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

Civil Action C75-1155

[Filed April 14, 1977]

STATE OF GEORGIA, DEPARTMENT OF TRANSPORTATION

vs.

UNITED STATES OF AMERICA

ORDER

The Order of the United States Court of Appeals having been read and considered, it is hereby

ORDERED that the Order be and is made the Judgment of this Court.

Dated this 13 day of April, 1977.

/s/ Richard C. Freeman
Judge, U.S. District Court

APPENDIX G

IN THE UNITED STATES DISTRICT COURT
FOR THE
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

Civil Action No. 75-1155A

[Filed April 14, 1977]

STATE OF GEORGIA,
DEPARTMENT OF TRANSPORTATION, PLAINTIFF

vs.

UNITED STATES OF AMERICA, DEFENDANT

JUDGMENT

This action having come on for consideration by the Court, Honorable Richard C. Freeman, United States District Judge, presiding, and the issues having been duly considered and a decision having been duly rendered granting Plaintiff's motion for summary judgment and denying Defendant's motion for summary judgment, and timely appeal having been taken by Defendant to the United States Court of Appeals for the Fifth Circuit, and this Court having received that court's subsequent order vacating the judgment of this Court and remanding the referenced cause to this Court in order that this Court might enter a new judgment from which direct appeal to the Supreme Court might be taken,

NOW, THEREFORE, IT IS ORDERED, ADJUDGED AND DECREED that this Court's judgment dated January 25, 1977 and entered *nunc pro tunc* December 30, 1976 is hereby vacated and set aside, and that judgment be and the same hereby is entered in favor of Plaintiff, State of Georgia, Department of Transportation against Defendant, United States of America, in the amount of $4,110.52 in tax and $191.70 assessed interest for a total amount of $4,302.22, plus interest according to law from July 26, 1971, and that the Plaintiff also recover of the Defendant its costs of this action.

This 13 day of April, 1977.

/s/ Richard C. Freeman
RICHARD C. FREEMAN
United States District Judge

CONSENTED TO AS TO FORM:

MYRON C. BAUM
Acting Assistant Attorney General
Tax Division

GILBERT ANDREWS
Chief, Appellate Section

GIL ROTHENBERG
Assistant Attorney General

JOHN W. STOKES, JR.
United States Attorney

By: /s/ Sherman D. Johnson
SHERMAN D. JOHNSON
Assistant United States Attorney

Attorneys for Defendant

ARTHUR K. BOLTON
Attorney General

ROBERT S. STUBBS, II, Executive
Assistant Attorney General

/s/ Richard L. Chambers
RICHARD L. CHAMBERS
First Assistant Attorney General

/s/ H. Perry Michael
H. PERRY MICHAEL
Senior Assistant Attorney General

/s/ David A. Runnion
DAVID A. RUNNION
Assistant Attorney General

Attorneys for Plaintiff

APPENDIX H

IN THE UNITED STATES DISTRICT COURT
FOR THE
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

Civil No. C75-1155A

[Filed May 9, 1977]

THE STATE OF GEORGIA,
DEPARTMENT OF TRANSPORTATION, PLAINTIFF

v.

UNITED STATES OF AMERICA, DEFENDANT

NOTICE OF APPEAL

NOTICE is hereby given that, pursuant to 28 U.S.C. § 1252, the defendant, United States of America, hereby appeals to the Supreme Court of the United States from the judgment entered herein on April 14, 1977.

JOHN W. STOKES, JR.
United States Attorney
By: /s/ John F. Murray
JOHN F. MURRAY
Attorney, Tax Division
Department of Justice
Washington, D.C. 20530
Telephone: (202)-739-2941

APPENDIX I

Federal Aviation Act of 1958, P.L. 85-726, 72 Stat. 731 Section 501(a) (49 U.S.C. 1401(a)):

> SEC. 501. (a) It shall be unlawful for any person to operate or navigate any aircraft eligible for registration if such aircraft is not registered by its owner as provided in this section, or (except as provided in section 1108 of this Act) to operate or navigate within the United States any aircraft not eligible for registration: Provided, That aircraft of the national-defense forces of the United States may be operated and navigated without being so registered if such aircraft are identified, by the agency having jurisdiction over them, in a manner satisfactory to the Administrator. The Administrator may, by regulation, permit the operation and navigation of aircraft without registration by the owner for such reasonable periods after transfer of ownership thereof as the Administrator may prescribe.

* * * *

Internal Revenue Code of 1954 (26 U.S.C.):

SEC. 4491. IMPOSITION OF TAX.

(a) [as amended by Sec. 305(a), Excise, Estate, Gift Tax Adjustment Act of 1970, P.L. 91-614 84 Stat. 1836]. *Imposition of Tax.*—A tax is hereby imposed on the use of any taxable civil aircraft during any year at the rate of—

(1) $25, plus

(2) (A) in the case of an aircraft (other than a turbine-engine-powered aircraft), 2

cents a pound for each pound of the maximum certificated takeoff weight in excess of 2,500 pounds, or (B) in the case of any turbine-engine-powered aircraft, 3½ cents a pound for each pound of the maximum certificated takeoff weight.

(b) *By Whom Paid.*—Except as provided in section 4493(a), the tax imposed by this section shall be paid—

(1) in the case of a taxable civil aircraft described in section 4492(a)(1), by the person in whose name the aircraft is, or is required to be, registered, or

(2) in the case of a taxable civil aircraft described in section 4492(a)(2), by the United States person by or for whom the aircraft is owned.

(c) *Proration of Tax.*—If in any year the first use of the taxable civil aircraft is after the first month in such year, that portion of the tax which is determined under subsection(a)(2) shall be reckoned proportionately from the first day of the month in which such use occurs to and including the last day in such year.

(d) *One Tax Liability Per Year.*—

(1) *In general.*—To the extent that the tax imposed by this section is paid with respect to any taxable civil aircraft for any year, no further tax shall be imposed by this section for such year with respect to such aircraft.

(2) *Cross reference.*—

For privilege of paying tax imposed by this section in installments, see section 6156.

(e) *Termination.*—On and after July 1, 1980, the tax imposed by subsection (a) shall not apply.

SEC. 4492. DEFINITIONS.

(a) *Taxable Civil Aircraft.*—For purposes of this subchapter, the term "taxable civil aircraft" means any engine driven aircraft—

(1) registered, or required to be registered, under section 501(a) of the Federal Aviation Act of 1958 (49 U.S.C., sec. 1401 (a)), or

(2) which is not described in paragraph (1) but which is owned by or for a United States person.

Such term does not include any aircraft owned by an aircraft museum (as defined in section 4041(h)(2) and used exclusively for purposes set forth in section 4041(h)(2)(C).

(b) *Weight.*—For purposes of this subchapter, the term "maximum certificated takeoff weight" means the maximum such weight contained in the type certificate or airworthiness certificate.

(c) *Other Definitions.*—For purposes of this subchapter—

(1) *Year.*—The term "year" means the one-year period beginning on July 1.

(2) *Use.*—The term "use" means use in the navigable airspace of the United States.

(3) *Navigable airspace of the United States.*—The term "navigable airspace of

the United States" has the definition given to such term by section 101(24) of the Federal Aviation Act of 1958 (49 U.S.C., sec. 1301(24)), except that such term does not include the navigable airspace of the Commonwealth of Puerto Rico or of any possession of the United States.

Treasury Regulations on Excise Tax (1954 Code) (26 C.F.R.):

§ 154-3-1 *Tax on use of civil aircraft.*

(a) *Purpose of this section.* In general, section 4491 of the Internal Revenue Code of 1954, as added by the Airport and Airway Revenue Act of 1970, imposes a tax upon the use, at any time during the taxable period, of any taxable civil aircraft in the navigable airspace of the United States. This tax is imposed upon such use during any taxable period beginning on July 1, 1970, and on each subsequent July 1 before July 1, 1980. This section sets forth rules as to the general applicability of the tax and also sets forth rules, as authorized by section 4493(a), to provide a method whereby certain lessees of taxable civil aircraft may elect to be liable for the tax. Further, this section provides administrative provisions relating to the payment of tax and the filing of tax returns.

(b) *Definitions*—(1) Use. The term "use" means use in the navigable airspace of the United States, as defined in section 4492(c)(3), except that such term does not include use by a manufacturer, dealer, wholesaler, retailer, exporter, or importer of aircraft solely for demonstration,

testing, or delivery purposes. Mere possession of a civil aircraft does not constitute "use."

(2) *Taxable civil aircraft.* The term "taxable civil aircraft" means any engine powered aircraft which is either registered or required to be registered under section 501(a) of the Federal Aviation Act of 1958 (49 U.S.C. 1401(a)) or which is owned by or for a U.S. person. Such term includes civil aircraft owned by the United States and local governments. Military aircraft and aircraft of the National Guard are not within the definition of taxable civil aircraft.

* * * *

☆ U. S. GOVERNMENT PRINTING OFFICE: 1977 236407 14

Supreme Court, U. S.
FILED
AUG 2 1977
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

NO. 77-16

UNITED STATES OF AMERICA,
Appellant,

v.

STATE OF GEORGIA, DEPARTMENT OF TRANSPORTATION,
Appellee

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF GEORGIA

MOTION TO AFFIRM OR TO SPECIALLY SET ARGUMENT

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1977

NO. 77-16

UNITED STATES OF AMERICA,

Appellant,

v.

STATE OF GEORGIA, DEPARTMENT
OF TRANSPORTATION,

Appellee

ON APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE NORTHERN
DISTRICT OF GEORGIA

MOTION TO AFFIRM OR TO SPECIALLY SET ARGUMENT

Appellee the State of Georgia, Department of Transportation, moves the Court to affirm the judgment of the court below on the ground that it is manifest that the questions on which the decision of the cause depends are so unsubstantial as not to need further argument.

In the alternative, should the Court deem full briefing and argument necessary,

Appellee requests the Court to note probable jurisdiction and moves the Court to set the case for oral argument in tandem with the argument of the case of Commonwealth of Massachusetts v. United States, October Term 1976, No. 76-1500, on the ground that both cases involve the same question and represent a split in the circuits on the question.[1]

STATEMENT OF THE CASE

This case arises out of an action brought by the State of Georgia to obtain a refund of taxes paid pursuant to section 4491 of the Internal Revenue Code of 1954, 26 U.S.C. § 4491, imposing a tax on the use of civil aircraft.

The aircraft with regard to which the taxes were paid were owned exclusively by the State of Georgia and were used exclusively by state agencies in the fulfillment of their duties and functions, all of which were traditional, governmental activities.[2]

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[1] See Supreme Court Rules, R. 43, ¶¶ 4 & 5; Socialist Labor Party v. Rhodes, ___ U.S. ___, 21 L. Ed. 2d 74, 89 S. Ct. 4 (1968).

[2] The uses included detection and prevention of forest fires, treatment of insect and disease infested forest areas, enforcement of game and fish laws, construction and maintenance of state roads and highways, and use in other governmental activities set out in the record below.

None of the aircraft were used for the benefit of any private person or the private benefit of any State official, and no income was derived by the State of Georgia from the use of the aircraft nor from the functions of the State in performance of which the uses occurred.

The State of Georgia argued below, and the lower court agreed, that under the doctrine of intergovernmental immunity the tax is unconstitutional as applied to the State's aircraft in this case. Thus, the question on appeal before this Court is whether the imposition by the federal government of a tax on the use of civil aircraft owned and operated exclusively by a state in the performance of traditional and essential governmental activities violates the doctrine of intergovernmental immunity under our governmental system of dual sovereigns.

This appeal is appropriately before the Supreme Court pursuant to the direct appeal provisions of 28 U.S.C. § 1252 (1970), and the United States appropriately acquiesced in the granting of certiorari in Commonwealth of Massachusetts v. United States, October Term 1976, No. 76-1500[3] in light of the United States' appeal in the instant case involving the identical issue. The decisions

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[3] See Memorandum for the United States, Case No. 76-1500, pp. 7-8.

of the lower courts in these two cases[4/] are the only two decisions involving 26 U.S.C. § 4491, and it is believed that the conflict between the two decisions is appropriate for resolution by this Court.

As will hereinafter be shown, the decision by the United States District Court for the Northern District of Georgia is a well reasoned opinion resting upon prior decisions of this Court, and as such may be affirmed on motion of the appellee. See Palmer Oil Corp. v. Amerada Petroleum Corp., 343 U.S. 390 (1952); Congress of Industrial Organizations v. McAdory, 325 U.S. 472, 477 (1945). However, should the Court deem full briefing and argument necessary or appropriate in light of the substantial impact of a decision in this case upon the states, as well as upon the taxing power of the federal government, then Appellee would respectfully request the Court to set the case down for oral argument in tandem with Case No. 76-1500.

4/ See the unreported Order of the United States District Court for the Northern District of Georgia, December 30, 1976, reprinted at p. 1a of the Appendix to the Jurisdictional Statement in the instant case; opinion of the United States Court of Appeals for the First Circuit, reported at 548 F.2d 33.

ARGUMENT

A. THE DECISION OF THE LOWER COURT WAS CORRECT UNDER THE PRIOR DECISIONS OF THIS COURT

Since the landmark case of McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819), this Court has recognized that the power to tax involves the power to destroy, and thus that there are limits to the exercise of the power of taxation by both the federal and state governments, so as to prevent one from destroying the other. 17 U.S. at 431, 433.

The doctrine of intergovernmental immunity has evolved since McCulloch v. Maryland, and even though it has undergone some apparent judicial retreats it remains today a vital judicial doctrine safeguarding the American governmental system of dual sovereigns. It is not an exaggeration to state that without the doctrine and the proper judicial application thereof the federal government could not only intrude into areas of essential governmental activities by the states, but could in fact totally usurp their discretionary authority in any number of areas; and the usurpation could be accomplished under the guise of carrying out otherwise appropriate activities or effectuating seemingly beneficial purposes.

This Court, however, has never refrained, when properly presented with the issue, from

analyzing the true effect of a federal tax burden upon state governmental operations, with a view toward protecting the sovereignty of the states which was intended under our constitutional system of government.

Thus, in the case of Indian Motorcycle Co. v. United States, 283 U.S. 570 (1931), the Court held that the sale of a motorcycle to a municipality for use in its police service was not constitutionally subject to a federal excise tax on the sale, even though the tax was imposed on the seller. The Court found that the maintenance of a police service by a state agency was a governmental function immune from federal taxation and that the tax was not so indirect or remote as to remove it from the principle of immunity. 283 U.S. at 579.

The analogy of the Indian Motorcycle case to the instant case is a close one, because some of the aircraft used by the State of Georgia are actually used for law enforcement activities.

In discussing the doctrine of intergovernmental immunity the Court stated:

> "Where the principle [of immunity] applies it is not affected by the amount of the particular tax or the extent of the resulting interference, but is absolute. McCulloch v. Maryland, ..." 283 U.S. at 575.

Thus, when the federal government interferes through taxation with sovereign activities of the states, it makes no difference how small or great is the interference with the states' operations; if the very activities themselves are immune, the tax may not be applied at all to the state.

Another important case is the much discussed decision of New York v. United States, 326 U.S. 572 (1946), which also supports the decision of the lower court in the instant case. In New York v. United States the Court upheld a federal tax on the sale of mineral water by New York but split on what the proper test for application of the doctrine of intergovernmental immunity should be.

Though the Court upheld the tax, even the judgment opinion recognized that state use of state owned property which is uniquely of use to the state is entitled to immunity from federal taxation. 326 U.S. at 582. In the instant case the civil aircraft owned and operated exclusively by the state for essential governmental functions are uniquely state property constituting a class by themselves and thus entitled to immunity from federal taxation under the reasoning of the judgment opinion.

Similarly, the approach presented in the concurring opinion of Chief Justice Stone in New York v. United States,

indicating that the key to invalidity is undue interference with the state's performance of sovereign functions, 326 U.S. at 588, weighs in favor of the state in the instant case because the tax is a direct tax upon the exclusive means employed by the state in performing essential governmental functions.

It is particularly clear that the decision of the lower court was correct under the decisions of this Court when the Indian Motorcycle case and the case of New York v. United States are read in conjunction with the recent case of National League of Cities v. Usery, 426 U.S. 833 (1976).5/

5/Appellee by no means intends to oversimplify the complexity of the proper analysis and application of the doctrine of intergovernmental immunity by such a brief discussion of each of these cases or by omitting to discuss other relevant cases; however, Appellee feels a detailed treatment of the cases would be more appropriate in a brief on the merits should the Court reserve ruling until after full briefing and argument.

B. THE CASE OF NATIONAL LEAGUE OF CITIES V. USERY MAKES IT CLEAR THAT IT IS DIRECTNESS OF INTERFERENCE WITH GOVERNMENTAL FUNCTIONS THAT DETERMINES THE VALIDITY OF A FEDERAL TAX UPON STATE ACTIVITIES

In the case of National League of Cities v. Usery, 426 U.S. 833 (1976), it was held that the minimum wage and maximum hour standards of the Fair Labor Standards Act, 29 U.S.C. §§ 201, et seq. (1940), were an invalid exercise of the federal commerce power insofar as they operated to directly displace the states' freedom and ability to structure integral operations in areas of traditional governmental functions.

The Usery case is significant for at least two reasons. First, it establishes, after a long silence by the Court in the area, that the doctrine of intergovernmental immunity not only still has vitality but that it remains a critical judicial tool for the protection of our constitutional form of government. Second, the case establishes the proper approach under the doctrine for determining the validity of a federal statute which encroaches upon areas of state activity.

In Usery the Court stated:

"This Court has never doubted that

> there are limits upon the power of Congress to override state sovereignty, even when exercising its otherwise plenary powers to tax or to regulate commerce . . . ." 426 U.S. at 842.

Then, after reviewing its prior decisions, including New York v. United States, supra, the Court in effect established a two pronged test for measuring the validity of a federal statute similar to the one in the instant case. First, the nature of the state activity or function is to be analyzed. If the state function is not a traditional, governmental function it is not entitled to freedom from federal interference. If, as in the instant case, the state activity is one traditionally left to the states in the exercise of their governmental sovereignty, then the next step is to measure the directness of federal interference in that area of activity. Where the action by the federal government directly interferes with the state activity, the federal interference is prohibited--due to a lack of power by the federal government to intrude in such a way.

As the Court stated, federal action applied to the states is invalid when it:

> "displaces state policies regarding the manner in which they will structure delivery of those governmental services which their

> citizens require." 426 U.S. at 847.

And thus the Court stated its own holding as being that federal statutes which:

> "operate to directly displace the States' freedom to structure integral operations in areas of traditional governmental functions, . . . are not within the authority granted Congress [by the constitution]." 426 U.S. at 852.

The federal excise tax on civil aircraft is invalid in the instant case because it is directly imposed upon the State of Georgia, and it directly interferes with the State of Georgia's freedom to select the method of providing and the means of performing essential and traditional governmental functions.

The record below establishes that the State of Georgia selected the aircraft involved in this case and the particular uses of the aircraft to which they were actually put as the means of accomplishing the governmental functions performed by the various State departments through the use of the aircraft. The federal tax was imposed upon State activities and policy decisions which were already in existence, and the tax has a direct burden upon the budget and appropriations of the State, since the aircraft were purchased with

appropriated State funds and the taxes were paid with appropriated State funds.

In addition, the tax was imposed upon the entire fleet of aircraft of the State of Georgia, so that not only was the taxation a direct interference, but it was also a substantial interference. Just as this Court recognized in the Usery case, if the tax on the use of civil aircraft be upheld, the only alternatives available to the State of Georgia would be to appropriate additional funds from its treasury for the payment of these taxes or to reduce its complement of airplanes. See 426 U.S. at 848. Such direct displacement of State choices as to how to administer its public laws and perform necessary public services, when directly upon the State and the State treasury and upon traditional governmental activities and property used exclusively in performing traditional governmental functions, is clearly an impermissible federal interference. See National League of Cities v. Usery, supra at 851-52.

Therefore, under the Usery case, the New York v. United States case, the Indian Motorcycle Co. case and the other prior decisions of this Court, the lower court was correct in entering judgment in favor of the State of Georgia, and its decision should be affirmed. The arguments to the contrary by the United States are without merit.

C. THE ARGUMENT THAT THE TAX IS CONSTITUTIONAL BECAUSE IT HAS BEEN CHARACTERIZED AS A "USER FEE" IS TOTALLY WITHOUT MERIT

By arguing that the tax assessed against the State of Georgia in this case, which was assessed and collected by the Internal Revenue Service, is not a tax but a "user fee", the United States begs the question in issue. The question is not what the levy may properly be labeled, but whether this particular interference by the federal government into admitted areas of traditional governmental functions is permissible under our system of government. Regardless of what it is called, it is not permissible. See National League of Cities v. Usery, supra.

Further, contrary to the arguments of the United States, the levy on the use of civil aircraft is as a matter of law a tax anyway. The nature of a tax is determined by its operation rather than by descriptive language applied to it, Educational Film Corp. v. Ward, 282 U.S. 379, 387 (1931), and thus this Court has recognized that a levy on gasoline is a tax and not a toll or charge for use of the highways, Nashville, Chattanooga & St. Louis Ry. v. Wallace, 288 U.S. 249, 268 (1933). And the taxing power is not related to and does not depend upon the enjoyment by the taxpayer of any special

benefit from the use of the funds raised by the tax. Id.

Therefore, the principle of immunity applies and invalidates the levy on Georgia's civil aircraft.

CONCLUSION

Since the decision of the lower court in this case was both correct and required under the prior decisions of this Court, Appellee would respectfully urge the Court to grant its motion to affirm. However, should the Court deem further briefing and argument necessary or helpful, Appellee would request the Court to set oral argument in this case in tandem with the Massachusetts case. While the issues in the two cases are identical, nevertheless, there are important factual distinctions in the two cases which the State of Georgia feels would be highly significant in the rendering of a final decision in this matter by the Court. Thus, in order to have the two cases argued in tandem, the State of Georgia is willing, if the Court should deem it necessary, to waive the full time authorized under the rules for the filing of a brief on the merits and to proceed under a modified briefing schedule so that the Court might have before it all factors relevant to the

very important issue involved in these cases prior to a final decision on the merits.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, David A. Runnion, one of the attorneys for Appellee herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that I have this day served Appellant with three copies of the foregoing Motion to Affirm or to Specially Set Argument by depositing same in the United States mail, with first class postage prepaid, addressed to counsel for Appellant, to wit:

Wade H. McCree, Jr.
Solicitor General
Department of Justice
Washington, D.C. 20530

I have also served a copy upon counsel for the Commonwealth of Massachusetts in Case No. 76-1500.

This _____ day of _____, 1977.

_____
DAVID A. RUNNION
Assistant Attorney General